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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SCOTT F. FITCH et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA UNEMPLOYMENT  
INSURANCE APPEALS BOARD,

Defendant and Respondent.

D069870

(Super. Ct. No. 37-2014-00032569-  
CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Lisa Guy Schall, Judge. Reversed and remanded with directions.

The Grant Law Firm, Duckor Spradling Metzger & Wynne and Cathleen G. Fitch for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Assistant Attorney General, Richard T. Waldow and Julie T. Trinh, Deputy Attorneys General, for Defendant and Respondent.

At all relevant times in this case, plaintiff Scott F. Fitch was the owner and the president of a small company that provided land surveying services, and his coplaintiff, Michael Valenti, was the company's vice-president. Neither was a salaried employee; they both were employed on an hourly basis and were paid for working on job-related matters and performing office overhead tasks.

During a four-year period between 2009 and 2013, after the company suffered an almost 80 percent reduction in revenue as a result of the 2008 recession, Fitch and Valenti (together plaintiffs) applied to the Employment Development Department (EDD) for, and received, unemployment compensation benefits under California's work sharing program (work sharing benefits). That program, which is governed by Unemployment Insurance Code<sup>1</sup> section 1279.5 and various implementing regulations (discussed, *post*), allows payment of work sharing benefits to eligible employees whose wages and usual weekly hours of work have been reduced by a minimum of 10 percent (and a maximum of 60 percent) in lieu of temporary or permanent layoffs pursuant to a work sharing plan submitted by an employer to, and approved by, EDD. (§ 1279.5, subds. (b), (c)(3) & (5), (h)(1)-(2) & (j).)

Under California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3), plaintiffs were required to report as hours worked during a work sharing week all "[v]olunteer (unpaid) hours worked *performing services*" (italics added). The term

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<sup>1</sup> All further statutory references are to the Unemployment Insurance Code unless otherwise specified.

"performing services" is not defined in section 1279.5 or in the regulations. (See § 1279.5; Cal. Code Regs., tit. 22, §§ 1279.5-1 ["Definitions"], 1279.5-8.)

Here, it is undisputed that plaintiffs did not report to EDD, as hours worked during a work sharing week, the unpaid idle time they spent in the office as a result of the decline in the company's business, waiting by the telephone for potential customers to call in when plaintiffs were not working on job-related matters or performing overhead tasks.

In 2013, following an investigation, EDD notified plaintiffs it had determined they were ineligible to receive work sharing benefits, and they were liable not only for repayment of the work sharing benefits they had received, but also for payment of penalties in specified amounts. Plaintiffs appealed to the Unemployment Insurance Appeals Board (Appeals Board), which upheld an administrative law judge's (ALJ's) affirmance of EDD's determinations that plaintiffs were ineligible to receive work sharing benefits and were required to repay the benefits they had received. However, the Appeals Board did not adopt EDD's and the ALJ's determinations that plaintiffs were required to pay penalties.

Plaintiffs commenced this action by filing in the superior court, under Code of Civil Procedure section 1094.5, a petition for a peremptory writ of mandate directing the Appeals Board to vacate and set aside its decisions and reverse the determinations of the administrative law judge denying them work sharing benefits. Plaintiffs appeal from the trial court's judgment denying their petition, arguing (1) they were entitled to work sharing benefits, and (2) they are not required to repay the work sharing benefits they

received because they "were not at fault in making any erroneous claim for work share benefits."

For reasons we shall explain, we conclude the Appeals Board's findings that plaintiffs worked 40 hours per week during the work sharing weeks in question, and thus that they were fully employed and ineligible to receive any of the work sharing benefits they received, are not supported by substantial evidence. We further conclude the Appeals Board's determination that plaintiffs are liable for repayment of the work sharing benefits they received must be reversed because the Board's implied finding that plaintiffs were at fault within the meaning of section 1375, subdivision (a) (hereafter section 1375(a))<sup>2</sup> also is not supported by substantial evidence. Accordingly, we reverse the judgment and remand the matter with directions.

#### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are employed by Southland Surveying, Inc. (Southland), which provides land surveying services. Fitch is the owner and president of Southland. Valenti, who is not a co-owner or licensed surveyor, is Southland's vice-president. Sally Fitch is Southland's part-time office manager.<sup>3</sup>

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<sup>2</sup> Section 1375(a) provides: "Any person who is overpaid any amount of benefits under this part is liable for the amount overpaid unless any of the following is applicable: [¶] (a)(1) The overpayment was not due to fraud, misrepresentation or willful nondisclosure on the part of the recipient, and (2) the overpayment was received without *fault* on the part of the recipient, and its recovery would be against equity and good conscience." (Italics added.)

<sup>3</sup> Because we are referring to plaintiff Scott Fitch as "Fitch," we shall refer to Sally Fitch by her full name for purposes of clarity.

Plaintiffs are not salaried employees; they are employed on an hourly basis and are paid for the hours they work on job-related matters and office overhead. Plaintiffs applied for and received work sharing benefits for many statement periods during a four-year period between May 2009 and May 2012.

In early 2013 EDD sent to plaintiffs numerous requests for eligibility information, asserting plaintiffs "may have reported INCORRECT hours worked" to EDD, and asking them, regarding specified weeks, "[D]id you perform *volunteer . . . hours in which you were not paid?*" (Italics added.) Through Sally Fitch, plaintiffs provided additional detailed information. Erik Von Herlhof, an EDD representative, spoke with Sally Fitch on several occasions.

In May 2013, in one of his written responses to EDD's inquiries, Fitch requested that EDD clarify the definition of "volunteer hours," stating: "The issue raised concerning '*volunteer hours*' will require further definition from EDD as it *is not sufficiently defined* in the resource material available or that EDD has provided." (Italics added.)

*A. EDD's Demand for Repayment of Work Sharing Benefits*

In August 2013 EDD notified plaintiffs separately that they had to repay, with a 30 percent penalty assessed under section 1375.1 (discussed, *post*), the work sharing unemployment benefits they had received, because EDD had learned they were "FULLY EMPLOYED" during the many weeks they claimed those benefits. Specifically, as best we can determine from the record, EDD notified Valenti in five overpayment notices that he was liable for repayment of work sharing benefits in the amount of \$40,549, plus

penalties in the amount of \$12,164.70, for a total of \$52,713.70. EDD notified Fitch in five overpayment notices that he was liable for repayment of work sharing benefits in the amount of \$40,420, plus penalties in the amount of \$12,126, for a total of \$52,546.

EDD's records show it based its determinations on information provided by Sally Fitch that plaintiffs were co-owners of Southland and they both were "in the office working 40 hours [per week] but [didn't] get paid for that time unless it [was] billable to a job[/project]." EDD determined plaintiffs were not eligible for work sharing benefits because they were "Fully Employed," and they should have reported as hours worked *all* of the unpaid hours they were in the office because the unpaid hours they spent there were considered reportable "volunteer hours" within the meaning of page 32 of EDD's Guide for Work Sharing Employers.<sup>4</sup>

#### *B. Administrative Appeals Hearing*

Plaintiffs appealed EDD's decisions to an administrative law judge of the Appeals Board. At the October 2013 hearing on their appeals, the ALJ received telephonic testimony from EDD's representative Erik Von Werlhof, and from Fitch, Valenti, and Sally Fitch.

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<sup>4</sup> Page 32 of the Guide for Work Sharing Employers explained that "[v]olunteer hours worked" must be included as part of the total hours a participating employee worked during a work sharing week: "Volunteer hours worked, *without pay*, by a participating employee must be included as part of the total hours worked during the week. Like overtime, there still must be a reduction in the total hours worked, including volunteer hours of at least 10 percent. [¶] *All hours worked* (paid or unpaid) during the Work Sharing week are calculated to determine the Work Sharing reduction."

1. *Von Werlhof's testimony*

Von Werlhof stated he is as an employment program manager at EDD. When he spoke with Sally Fitch in February 2013, she told him Southland worked on a billable-hour and nonbillable-hour basis and that only billable hours were being reported to EDD on the work sharing benefits claim forms. After he consulted with another manager and two adjudication specialists, Von Herlhof determined there was an issue as to whether plaintiffs' reduction in work hours was less than the minimum 10 percent specified in section 1279.5, and thus there was an issue as to whether they were eligible for work sharing benefits under the work sharing program. Von Herlhof determined that both plaintiffs were ineligible to receive those benefits from the beginning of the work sharing program, and he assessed overpayments and penalties.

The ALJ asked Von Herlhof, "What led you [to] think that there was a deliberate fraud on the parts of the claimants?" Von Herlhof replied that page 32 of EDD's Guide for Work Share Employers<sup>5</sup> mentioned that any unpaid hours that were performed on a volunteer basis needed to be included in the total number of hours worked that were reported to EDD on the work sharing forms.

Von Herlhof also testified that he was informed Fitch and Valenti were "principals/co-owners in [Southland]," who "by virtue of their positions [] would be working 40 hours or more per week," and that "since the volunteer hours— . . . otherwise known as nonbillable hours—were not being included with the total hours worked, this

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<sup>5</sup> See footnote 4, *ante*.

led us to believe that information was being reported incorrectly to [EDD]." He added, "[W]e are acting upon information provided by Sally Fitch."

Von Herlhof further testified that, although plaintiffs may not have been performing any physical work when they were in the office, "any services being performed with the intent of acting on the company's behalf are considered as volunteer hours."

## *2. Fitch's testimony*

Fitch testified that he and Valenti began participating in the work sharing program in May 2009 and that the amounts of benefits alleged as overpayments, not including the penalties, accurately reflected the benefits received. He told the ALJ he was the owner, not a co-owner, of Southland, and he was the licensed land surveyor who was responsible for "the field work that's done when the field guys go out there and do their land surveying."

Fitch testified that "[t]he assertion that [he was] in the office working 40 hours but [did not] get paid for that time unless it [was] billable to a job or a project" was incorrect. He also testified that the "[t]ime listed on the forms that were submitted to EDD [was] a direct record of what it [was] that we submit[ted] to our payroll company," and "[t]hat record of time [included] billable [and] nonbillable hours. It's basically a record of . . . the amount of paid hours that the company paid me and/or [Valenti] for work that we performed."

Fitch indicated that as a result of the recession of 2008, Southland's business suffered an almost 80 percent reduction in revenues and severe personnel cutbacks. As a

further result, he was required to perform multiple roles in the company. In addition to being the owner and serving as the president and licensed surveyor, he sometimes was the receptionist, did the billings, dispatched field crews, and "basically [did] everything that need[ed] to be done with a small business or micro-small business in our case."

Fitch told the ALJ that Southland had five employees. He explained that Southland was "running one two-person [survey] crew," he and Valenti "[were] in the office[,] and [Sally] Fitch [was] the office manager" who worked part-time and "[came] in Monday, portions of Tuesday and portions of Thursday."

The ALJ asked Fitch, "[H]ow do you decide how you get paid?" Fitch explained he would get paid "if it's a job that I can bill to for my time," and he also would get paid "if there is company work that is clearly overhead like doing proposals or dealing with medical insurance, professional insurance, all these kind of things."

The ALJ then asked Fitch, "How do you go about generating business?" Fitch responded that he generated business in a number of different ways, such as "prepar[ing] proposals and submit[ting] them to contractors who are bidding publicly," and getting referrals from previous clients. He testified that "last year [(2012)] 90 percent of [Southland's] business was from referrals from previous clients," but "a lot of times" he would "get calls out of the blue from either engineering companies, contractors or . . . other people just looking for someone to do surveying."

The ALJ asked Fitch about a "random" week, August 22, 2009, noting that Fitch "had work share for 37 hours, worked three hours that week." The ALJ asked Fitch, "[H]ow would a three-hour work week go for you?" Fitch responded that if a survey

crew was scheduled, he would go to the office early "to brief them on what it [was] that [they were] going to do and assemble the information that they needed to go out and do the project." The crew would leave by 6:30 a.m. and would usually return between 2:00 and 3:00 in the afternoon. Fitch testified that once the field crew left the office, "[i]f there [was] something else for [him] to do like a proposal or corporate administration, [he] would go ahead and do that and *charge* the company [his] *overhead time*" (italics added). However, "if there was nothing else to do[, he would] still have to be [t]here when the crew [got] back from their field visit." He would "hang out" in the office until the crew returned. When they returned, Fitch would "take their field notes and/or the status of what they've done, relay that on to the client." Fitch acknowledged this three-hour work week was one day of surveying.

The ALJ then asked Fitch what he would do "on the other four days of the week [when he] didn't have a survey crew out." Fitch replied, "I would come into the office because I thought that the best way of me being available for work or . . . searching for work was to be at this location where everybody calls in." He added, "[There were] literally times [when] there was nothing to do." However, he explained, "a lot of times . . . we get work . . . based on . . . having a physical presence at the . . . phone number where people will call in."

The ALJ asked Von Herlhof whether he had any questions for Fitch. Von Herlhof directed Fitch's attention to the work sharing form for Valenti for the week that ended October 9, 2010, and asked Fitch whether the time shown for Valenti included both billable and nonbillable hours. Fitch acknowledged that it did. He explained that

"[w]ages were paid for both billable hours and nonbillable hours" (italics added), and that "if there was something that needed to be done that was legitimately ascribed to a company requirement, we would pay those hours as well." He added, "What the record is of the payments is that . . . the work share form was filled out based on the payroll records that we previously submitted to EDD."

Referring back to the three-hour work week in August 2009 that the ALJ had asked about, Von Herlhof asked Fitch whether, when he was in the office waiting for the survey crew to return in the afternoon, "that was something that was required for the overall efficient operation of your company, you being there in the office in addition to those three hours?" Fitch responded that his time waiting in the office "would be not charged as billable or as nonbillable hours if there was nothing being done."

Von Herlhof then asked Fitch, "So with you in the office while nothing was being done so to speak as you were just mentioning, that was still with the intent o[f] acting on behalf of your company; is that correct?" Fitch replied, "Not necessarily acting on behalf of my company but actually as the best way that we thought to be there when the opportunity for work arose and the best way for us to try to get work if in fact somebody did call in and ask for it." Fitch acknowledged he was in the office hoping to generate business for the company in the event a call from a potential client came in.

Fitch told the ALJ that, in his appeal, he asked for a definition of the term "volunteer hours." Fitch also told the ALJ that "they referred me to Page 32 of the . . . EDD pamphlet, the Guide for Work Sharing Employe[r]s." He then stated, "I'm trying to find out if there is a definition for volunteer hours and what that entails."

The ALJ asked Von Herlhof to respond. Von Herlhof indicated that Fitch had seen a copy of the Guide for Work Sharing Employers and a copy had been provided to Sally Fitch. Fitch acknowledged he had seen a copy, but indicated that page 32 of the Guide did not provide a definition of "volunteer hours." Von Herlhof replied, "Well, they'll find that *any hours [of] work where no pay is received*, those—that *defines volunteer hours.*" (Italics added.)

### 3. Valenti's testimony

Valenti testified he was the vice-president, not an owner, of Southland. His duties included doing calculations for the field survey crews, answering the phone, preparing proposals, and filling in for Fitch in his absence.

The ALJ asked Valenti, "How do you get paid or . . . who determines how you get paid and what you get paid for?" Valenti replied, "It pretty much shadows what Mr. Fitch's testimony was. When I have time that is directly billable to a project or—or job-related time, that goes as billable or overhead time, all other time, any other time, I'm basically unemployed."

The ALJ then asked Valenti, "[W]hat would you do during a week in which there was no work to do?" Valenti responded, "Basically nothing. If there was . . . nothing for me to do, if there [were] no proposals, no job-related things I . . . did absolutely nothing."

After Valenti acknowledged he sometimes would go to the office, the ALJ asked him, "[W]hat would you do in the office?" Valenti replied, "Basically nothing. Just kind of waiting for work to file in. Normally when we do get work it's . . . by referral, comes in through phone and we have to respond in a timely fashion and when that work comes

in I have to pre-calculate information so that the field crews can . . . get that work performed to service our clients in a timely fashion."

#### 4. *Sally Fitch's testimony*

Sally Fitch testified that she had worked "off and on in [Southland's] office for the past 20 years" and that Fitch is her brother-in-law. She acknowledged that she normally worked in the office on Mondays, Tuesdays and Thursdays. She indicated *she erroneously told EDD that Fitch and Valenti were co-owners*. She also indicated that Fitch and Valenti spent a lot of time in the office that was not included on the work share forms, but stated that her observations were based on her being in the office "20 hours or less a week."

The ALJ asked Sally Fitch, "[W]hen you were [in the office] on [Mondays, Tuesdays and Thursdays,] what did you observe as far as Mr. Valenti and Mr. Fitch working?" She replied, " Well, . . . that's hard to quantify. However, I would say that *it would've been highly unusual if . . . they would not have been [there] when I was [there]* because I can cut checks but I can't answer issues about right angles." (Italics added.) She acknowledged that she had filled out the work share certification forms.

The ALJ then asked her, "Where did you get the information to do that?" She responded, "First of all, I knew what their base pay would be optimistically over a two-week period based on their hourly rate times 40 or times 80. Secondly, I would then take what time they had on the timesheets which was a code that said they could be paid for it. And again, I clarify. In the terms of billable, I mean billable in the sense that it would be *jobs they could charge to or office overhead or activities* they could. But . . . they could

not charge 40 hours. Even if they were [there] 40 hours because they were [there] to wait for the field to come in. There may not have been work for them." (Italics added.)

### *C. ALJ's Decisions*

The ALJ issued numerous decisions based on the foregoing testimony and other evidence. The ALJ determined plaintiffs were not eligible for work sharing unemployment benefits, and they were liable both for repayment of the benefits they received, and for payment of the 30 percent penalty assessed by EDD.

In support of his decisions, the ALJ found that "[i]n weeks when there was surveying work, [plaintiffs] received wages based on billable hours," that "[s]ome additional hours were charged to overhead," and that "[t]he hours they reported to [EDD] reflected the wages they allocated to themselves."

The ALJ also found that plaintiffs "spent many more hours in the office than were listed on the work share certificates. They wanted to be available to receive calls for more work and to try and generate new business. When surveying work was available, claimant Fitch would brief the team on the assignment in the early morning. He would remain in the office to be available for consulting and be at the office when the team returned to obtain their report and notify the client."

Citing the testimony of Sally Fitch that she worked about 20 hours a week and plaintiffs were in the office almost all of the hours when she was working, the ALJ found that Southland was "unable to provide documentation of the actual hours [plaintiffs] were in the office."

Based on these factual findings, the ALJ concluded that plaintiffs "were at work many more hours than were reported on the work share certificates," and, "[i]n the absence of any evidence of the actual hours they spent on the job, it must be concluded that [they] did not suffer a loss of hours of at least [10 percent] and were properly denied work share benefits." (Italics added.)

*D. Plaintiffs' Appeal to the Appeals Board and Its Determinations*

Plaintiffs appealed the ALJ's decisions to the Appeals Board. In support of their appeals, plaintiffs submitted the affidavits of Fitch and Sally Fitch.

*1. Appeals Board's decisions*

The Appeals Board issued final decisions affirming the ALJ's determinations that plaintiffs were ineligible for work sharing benefits and they were liable for repayment of the work sharing benefits they had received but, in the exercise of its discretion, it did not adopt the ALJ's affirmance of the 30 percent penalty assessed by EDD.

In support of its decisions, the Appeals Board adopted the ALJ's factual findings (discussed, *ante*). The Appeals Board made several additional factual findings: (1) Fitch "wears 'many hats' in his company's business," including serving as the field supervisor, dispatching and receiving field crews, acting as receptionist, and handling billing and "everything that needs to be done" for a small business; (2) Fitch "determines whether time spent doing a particular job or task[] can be billed to a client or project and which tasks are overhead, such as preparing proposals and dealing with medical insurance, professional insurance, and similar issues"; (3) "[w]hen a surveyor crew returns from the field, [Fitch] takes the team's field notes, obtains the status of what they've done, and

relays their results to the client"; (4) Fitch "believes it is important to be present in the office in case an opportunity arises as well as to receive the field crew upon their return and perform overhead and other business-related tasks when necessary"; (5) Fitch "also spends some time in the field"; (6) Southland's vice-president, Valenti, is not a licensed surveyor, and "[s]ome of his duties include doing calculations for the field layout for the field survey crews, answering phones, preparing proposals, and sitting in for claimant Fitch if he is absent, including in the field"; and (7) plaintiffs, as Southland's officers, "were unable to quantify the hours spent in the office during specified time periods."

In affirming the ALJ's ineligibility and repayment liability determinations, the Appeals Board reasoned that "[plaintiffs] paid themselves for fewer than all the hours they spent in the office and field attending to [Southland's] business so their wages were reduced from an anticipated 40-hour week amount. However, [plaintiffs'] work hours were not reduced. Rather, [plaintiffs] spent many hours for the benefit of the company, some waiting for phone calls or work inquiries, some waiting for the survey teams, and some engaged in various activities on behalf of the employer. These hours cannot be used as reduced hours for work sharing purposes, but rather are hours worked during the work sharing week."

The Appeals Board also reasoned that "section 1279.5, as implemented by [California Code of Regulations, title 22, section] 1279.5-8(b)(3)[,] require[s] unpaid, volunteer hours to be counted as hours worked during the work sharing week." The Appeals Board then stated, "[Plaintiffs'] presence in the office to answer the phone, dispatch and receive survey crews, and perform overhead and other work-related duties

was to the company's benefit and cannot be used as part of the reduction of hours required for work sharing eligibility."

E. *Plaintiffs' Petition for Writ of Mandate*

1. *Petition*

Plaintiffs sought judicial review of the Appeals Board's decisions by filing a petition for writ of mandate (Code Civ. Proc., § 1094.5). Plaintiffs alleged the Appeals Board's decisions denying them work sharing benefits and requiring them to reimburse EDD for the work sharing benefits they received constituted a prejudicial abuse of discretion and should be overturned because the Appeals Board's findings were not supported by the evidence. Specifically, plaintiffs asserted the Appeals Board's "findings that [they] were not entitled to work sharing benefits because they failed to account for 'voluntary work hours' [were] factually flawed and legally unsupported as *there is no definition or guidance as to the definition of voluntary work hours in the law*, or provided to [plaintiffs]." (Italics added.)

In their petition plaintiffs also asserted they "did not perform voluntary work hours and [they] properly submitted their claim for benefits based on a qualifying reduction in work hours of over [10 percent] for the periods requested." They further asserted "[t]here is no support for the finding that [they] performed voluntary work hours because they were 'at work,' meaning present in the office, and no support for the finding that [they] were at fault in receiving benefits."

Plaintiffs also alleged in their petition that the Appeals Board "applied the incorrect law and legal standard to [their] claims and evidence" because "[a]n employee's

entitlement to benefits is to be *liberally construed* and [they] must be at fault in receiving benefits, whereas the [Appeals Board] *narrowly applied the undefined term of 'voluntary hours worked' in an arbitrary fashion* and incorrectly applied the law in determining [they] were at fault in receiving benefits." (Italics added.) Plaintiffs requested a peremptory writ of mandate directing the Appeals Board to vacate and set aside its decisions and reverse the determinations of the administrative law judge denying them work sharing benefits.

## 2. *Opposition*

In opposition to the petition, the Attorney General asserted on behalf of the Appeals Board that the petition should be denied because plaintiffs "[had] failed to show that the weight of the evidence from the administrative record require[d] overturning the [Appeals Board's] decision[s]." Specifically, the Attorney General asserted the plaintiffs were "not eligible for work sharing benefits" because "[t]he evidence established that [they] would spend time in the office for which they were not paid in order to wait for new work to come in and to take advantage of opportunities for additional work. [Citations.] By being at the office, [plaintiffs] were able to field incoming phone calls and provide timely responses to inquiries from potential customers. [Citations.] *The unpaid time [plaintiffs] spent trying to increase Southland's business was time spent, and service provided, for the benefit of their employer.*" (Italics added.) Thus, the Attorney General asserted, "[plaintiffs'] unpaid work hours constitute[d] volunteer work under California Code of Regulations, title 22, section 1279.5-8(b) and must be included when calculating the number of hours [plaintiffs] each worked during a given week."

The Attorney General further asserted that "[t]he time [plaintiffs] spent at the office waiting for field crews to return was time spent for the benefit of the company because it was necessary for them to be at the office whenever the crews returned in order to remain informed about the progress of the crews' projects and convey status information, to Southland's clients. [Citation.] As such, this time constitute[d] volunteer work under California Code of Regulations, title 22, section 1279.5-8(b) and must be included when calculating the number of hours [plaintiffs] each worked during a given week."

With respect to the issue of fault, the Attorney General asserted that plaintiffs "were at fault for the overpayment of work share benefits because they failed to properly report their work hours or to consult the manual provided by EDD to become properly informed regarding the reporting requirements. [Plaintiffs] received EDD's Guide for Work Sharing Employers when they began participating in the program. This guide clearly details that 'unpaid' or 'volunteer' work hours must be reported on employees' work share forms as part of the total hours worked. [Citations.] Upon enrollment in the work share program, [plaintiffs] had the reasonable obligation of reviewing the guide provided to them to insure that they were following the applicable rules and accurately reporting their hours to EDD." However, "they neglectfully operated under the assumption that they were following the rules, and did not inquire as to the impact of unpaid or volunteer work hours until May 2013 — after EDD began to investigate their work share reporting, and at least four years after beginning the work share program."

### 3. *Court's ruling*

The court conducted a hearing on plaintiffs' petition in late October 2015. Upholding the ALJ's determinations and the Appeals Board's decisions, the court denied plaintiffs' petition and entered judgment in favor of the Appeals Board.

## DISCUSSION

Plaintiffs argue the judgment requiring them to repay the work sharing benefits they received must be reversed because (1) they were entitled to those benefits, and (2) if they received any overpayments of work sharing benefits, they are not required to reimburse EDD under section 1375(a) because "they were not at fault in making any erroneous claim for work shar[ing] benefits."

We conclude the Appeals Board's findings that plaintiffs were fully employed and thus they were ineligible to receive *any* of the work sharing benefits they received, are not supported by substantial evidence. We further conclude the Appeals Board's determination that plaintiffs are liable for repayment of all of the work sharing benefits they received was erroneous because the Board's implied finding that they were at fault within the meaning of section 1375(a) is also not supported by substantial evidence.

### *A. Applicable Legal Principles*

#### *1. Statutory scheme*

##### *a. Purpose of California's Unemployment Insurance Code*

"The fundamental purpose of California's Unemployment Insurance Code is to reduce the hardship of unemployment by 'providing benefits for persons unemployed

through no fault of their own.'" (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558, fn. omitted, quoting § 100.)

The public policy that guides the interpretation and application of the Unemployment Insurance Code is set forth in section 100, which states in part: "As a guide to the interpretation and application of this division the public policy of this State is declared as follows: [¶] . . . [¶] The Legislature . . . declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance *providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.*" (Italics added.)

b. *Work sharing program*

California's work sharing program is "the program described in Section 1279.5 of the Unemployment Insurance Code which provides employers with an alternative to layoffs and their employees with the payment of reduced unemployment insurance benefits." (Cal. Code Regs., tit. 22, § 1279.5-1, subd. (j).) The work sharing program allows payment of work sharing unemployment compensation benefits<sup>6</sup> to eligible

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<sup>6</sup> "Work sharing compensation" is defined in section 1279.5 as "the unemployment compensation benefits payable to employees in an affected unit under an approved work sharing plan, as distinguished from the unemployment compensation benefits otherwise payable under this part." (§ 1279.5, subd. (a)(3).) The implementing regulations define "[w]ork sharing benefits" as "the unemployment insurance benefits payable under the provisions of [section 1279.5]." (Cal. Code Regs., tit. 22, § 1279.5-1, subd. (g).)

employees whose wages and usual weekly hours of work<sup>7</sup> have been reduced in lieu of temporary or permanent layoffs pursuant to a work sharing plan<sup>8</sup> submitted by an employer to, and approved by, the EDD. (§ 1279.5, subds. (b), (c)(3) & (5), (h)(1)-(2) & (j).)

An eligible employee's coverage under the work sharing program is based on a reduction of the employee's usual weekly hours of work.<sup>9</sup> (§ 1279.5, subd. (h)(2).)<sup>10</sup> An employer participating in the work sharing program is required to identify both the usual weekly hours of work for the work sharing employees and the specific percentage by which their hours will be reduced during all weeks covered by the plan (§ 1279.5,

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<sup>7</sup> "Usual weekly hours of work" is defined as "the usual hours of work for full- or part-time employees in the affected unit when that unit is operating on its regular basis, not to exceed 40 hours and not including hours of overtime work." (§ 1279.5, subd. (a)(6).)

<sup>8</sup> "Work sharing plan" is defined in section 1279.5 as "a plan submitted by an employer, for approval by the director, under which the employer requests the payment of work sharing compensation to employees in an affected unit of the employer in lieu of layoffs." (§ 1279.5, subd. (a)(4).) California Code of Regulations, title 22, section 1279.5-1, subdivision (i) defines "[w]ork sharing plan" as "all the information submitted by the employer in the application to the department for participation in the work sharing program. (Refer to Section 1279.5-2 of these regulations for the required information.)"

<sup>9</sup> See the definition of "usual weekly hours of work" in footnote 7, *ante*.

<sup>10</sup> Section 1279.5, subdivision (h)(2) provides: "Notwithstanding any other provision of law, an employee covered by a work sharing plan is deemed unemployed in any week during the duration of that plan if the employee's remuneration as an employee in an affected unit is reduced based on a reduction of the employee's *usual weekly hours of work* under an approved work sharing plan." (Italics added.)

subd. (c)(3)).<sup>11</sup> The percentage of reduction of usual weekly hours of work for which a work sharing plan may be approved must be "not be less than 10 percent or more than 60 percent." (*Ibid.*; see fn. 11, *ante.*)

The participating employer also must certify that the aggregate reduction of the work sharing employees' usual weekly work hours is "in lieu of temporary or permanent layoffs, or both." (§ 1279.5, subd. (c)(5).)<sup>12</sup>

For purposes of the work sharing program's claim filing process, the regulations require that the work sharing employer "complete a certification to enable an employee to file a claim for weekly or bi-weekly work sharing benefits." (Cal. Code Regs., tit. 22,

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<sup>11</sup> Section 1279.5, subdivision (c)(3) provides: "(c) An employer wishing to participate in the work sharing program . . . shall submit a signed written work sharing plan to the director for approval. The director shall develop an application form to request approval of a work sharing plan and an approval process that meets the requirements of this section. The application shall include, but is not limited to, the following: [¶] . . . [¶] (3) A requirement that the *employer identify, in the application, the usual weekly hours of work for employees in the affected unit and the specific percentage by which their hours will be reduced during all weeks covered by the plan.* The percentage of reduction of usual weekly hours of work for which a work sharing plan may be approved shall *not be less than 10 percent or more than 60 percent.* If the plan includes any week for which the employer regularly does not provide work, including, but not limited to, incidences due to a holiday or plant closing, then that week shall be identified in the application." (Italics added.)

<sup>12</sup> Section 1279.5, subdivision (c)(5) provides: "(c) An employer wishing to participate in the work sharing program . . . shall submit a signed written work sharing plan to the director for approval. The director shall develop an application form to request approval of a work sharing plan and an approval process that meets the requirements of this section. The application shall include, but is not limited to, the following: [¶] . . . [¶] (5) *Certification by the employer that the aggregate reduction in work hours is in lieu of temporary or permanent layoffs, or both.* The application shall include an estimate of the number of workers who would have been laid off in the absence of the work sharing plan." (Italics added.)

§ 1279.5-5, subd. (a).) On each certification, the employer is required to include (among other things) the normal weekly hours of work, the reduced hours worked due to work sharing, and the percentage of hour reduction due to working sharing by the employee. (*Id.*, subd. (e)(6)-(8).)<sup>13</sup> The employer must issue the certification to the claimant employee within specified time limits. (*Id.*, subd. (b).)<sup>14</sup>

After receiving the certification from the employer, the work sharing employee claimant must provide on the certification a statement that the information provided by the employer therein is "true and correct to the best of the claimant's knowledge." (Cal. Code Regs., tit. 22, § 1279.5-6, subd. (c)(4)(A).)<sup>15</sup>

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<sup>13</sup> Subdivision (e)(6) through (8) of California Code of Regulations, title 22, section 1279.5-5 (Work Sharing Employer Responsibilities in the Claim Filing Process), provides: "(e) On each certification, the information provided by the work sharing employer shall include: [¶] . . . [¶] (6) The *normal weekly hours of work* and the employee. [¶] (7) The *reduced hours worked due to work sharing by the employee* during the week(s) to which the certification applies. The reduced hours worked shall not exceed 36 hours. (See Section 1279.5-8 of these regulations.) [¶] (8) The *percentage of hour reduction due to work sharing*. This is the normal weekly hours of work in above subsection (6) of these regulations minus the reduced weekly hours described in subsection (7) of these regulations and divided by the normal weekly hours of subsection (6)." (Italics added.)

<sup>14</sup> California Code of Regulations, title 22, section 1279.5-5, subdivision (b) provides: "The work sharing employer shall issue the certification to the employee by the later of either the fourteenth calendar day after the end of the week to which the certification applies, or the fourteenth calendar day after the department sends written notification to the work sharing employer that its work sharing plan has been approved."

<sup>15</sup> Subdivision (c)(4)(A) of California Code of Regulations, title 22, section 1279.5-6 (Claimant Responsibilities in the Claim Filing Process) provides: "(c) On each certification the information provided by the claimant shall include: [¶] . . . [¶] (4) A statement that: [¶] (A) The information provided is true and correct to the best of the claimant's knowledge[.]"

An eligible work sharing employee covered by an approved work sharing plan is paid a percentage of the regular weekly unemployment compensation benefit amount depending on the percentage of reduction of the employee's usual weekly hours of work for that week. (§ 1279.5, subd. (j).)<sup>16</sup>

The work sharing program regulations provide guidance on how a participating employer must calculate the percentage of reduction of an employee's usual weekly hours of work for a given week<sup>17</sup> and also provide an example that illustrates how the calculation is made.<sup>18</sup>

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<sup>16</sup> Section 1279.5, subdivision (j) provides: "The work sharing weekly compensation amount shall be the product of the regular weekly unemployment compensation amount for a week of total unemployment multiplied by the percentage of reduction in the individual's usual weekly hours of work."

<sup>17</sup> Subdivision (a) of California Code of Regulations, title 22, section 1279.5-8 (Calculation of Hour Reduction) provides: "(a) To calculate the percentage by which an employee's normal weekly hours of work were reduced as a result of a work sharing plan, the work sharing employer shall: [¶] (1) Subtract the actual (reduced) hours worked during the work sharing week (hours worked are described below in subsection (b) of these regulations) from the normal weekly hours of work (hours the employee would have worked) before the implementation of the work sharing plan), and [¶] (2) Divide the difference (obtained in above subsection (a)(1) of these regulations) by the normal weekly hours of work." For purposes of this regulation, the term "normal weekly hours of work" is defined as "either those hours an employee in the same position or job classification would have worked for the work sharing employer, if there had been no reduction in hours due to work sharing, or 40 hours, whichever is less." (*Id.* at § 1279.5-1, subd. (e).)

<sup>18</sup> The following example is provided in subdivision (a) of California Code of Regulations, title 22, section 1279.5-8: " Example: The claimant's normal weekly hours of work are 40. However, due to work sharing, the claimant's hours were reduced to 32. The claimant's hours have been reduced by 8 hours (40 - 32 = 8). To determine the percentage of hour reduction, divide the amount the hours have been reduced by the

i. "*Volunteer (unpaid) hours worked performing services*"

California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3) provides that the calculation of hours worked during a work sharing week must include (among other things) "[v]*olunteer (unpaid) hours worked performing services* during the week to which the certifications applies for the work sharing employer."<sup>19</sup> (Italics added.) The term "performing services" in that section is not defined. (See *ibid.*; see also *id.* at § 1279.5-1 ["Definitions"].)

ii. *Liability for overpayment of work sharing benefits*

An employee's liability for overpayment of work sharing benefits is governed by section 1375(a), which provides in part: "Any person who is overpaid any amount of benefits under this part is liable for the amount overpaid unless any of the following is applicable: [¶] (a)(1) The overpayment was not due to fraud, misrepresentation or willful nondisclosure on the part of the recipient, and (2) the overpayment was received without

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normal weekly hours worked, this figure is the percentage by which the normal weekly hours were reduced ( $8 \div 40 = .20$ , or a 20% reduction in the normal weekly hours of work)."

<sup>19</sup> California Code of Regulations, title 22, section 1279.5-8, subdivision (b) provides in full: "(b) Hours worked during the work sharing week shall include: [¶] (1) Hours an employee is paid for performing services for the work sharing employer. [¶] (2) Hours an employee is paid for time off due to vacation, holiday, sick leave, and other types of paid leave. The hours are allocable to the week the vacation, holiday, sick leave, or other paid leave was taken. [¶] (3) *Volunteer (unpaid) hours worked performing services* during the week to which the certifications applies for the work sharing employer." (Italics added.)

fault on the part of the recipient, and its recovery would be against equity and good conscience." (§ 1375(a)(1)-(2).)<sup>20</sup>

iii. *Penalty assessments*

Section 1375.1 authorizes EDD to assess, against a person who has been overpaid unemployment compensation benefits, a penalty in the amount of 30 percent of the overpayment amount if that person willfully, for the purpose of obtaining unemployment compensation benefits, either (1) made a false statement or representation with actual knowledge of the falsity thereof, or (2) withheld a material fact.<sup>21</sup>

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<sup>20</sup> Section 1375 provides in full: "Any person who is overpaid any amount of benefits under this part is liable for the amount overpaid unless any of the following is applicable: [¶] (a)(1) The overpayment was not due to fraud, misrepresentation or willful nondisclosure on the part of the recipient, and (2) *the overpayment was received without fault on the part of the recipient*, and its recovery would be against equity and good conscience. [¶] (b) The person who received the overpayment cooperates with the department in an investigation that results in the assessment of a penalty under Section 1144 or the prosecution or other action taken to impose a penalty pursuant to Section 2121. [¶] (c) The department determines that it is in the interest of justice to waive all or part of the liability established under this section because the overpayment was a direct result of inducement, solicitation, or coercion on the part of the employer." (Italics added.)

<sup>21</sup> Section 1375.1 provides in part: "If the director finds that an individual has been overpaid unemployment compensation benefits because he or she willfully, for the purpose of obtaining unemployment compensation benefits, either made a false statement or representation, with actual knowledge of the falsity thereof, or withheld a material fact, the director shall assess against the individual an amount equal to 30 percent of the overpayment amount."

## 2. *Administrative mandamus standards and appellate standard of review*

### a. *Administrative mandamus*

In *TG Oceanside L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355 (*TG Oceanside L.P.*), this court explained that "[o]n a properly filed petition for a writ of mandate under Code of Civil Procedure section 1094.5, a court sitting without a jury is empowered to 'inquir[e] into the validity of any [discretionary] final administrative order or decision' made after an evidentiary hearing." (*Id.* at p. 1370.) "In such a case, the scope of the court's review is limited to determining, inter alia, 'whether there was a fair trial; and whether there was any prejudicial abuse of discretion.'" (*Ibid.*, citing Code Civ. Proc., § 1094.5, subd. (b); *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 216.) "An abuse of discretion is established if an administrative agency or officer "'has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.'" (*TG Oceanside L.P.*, at p. 1370.)

### b. *Standard of review on appeal*

"On appeal, this court reviews not the *trial court's* ruling, but the *hearing officer's* final administrative decision." (*TG Oceanside L.P.*, *supra*, 156 Cal.App.4th at p. 1370, fn. omitted.) In reviewing the final administrative decision, this court must consider whether substantial evidence supports the hearing officer's factual findings. (*Ibid.*) "In doing so, we consider all relevant evidence in the administrative record, beginning with the presumption that the record contains evidence to sustain the hearing officer's findings

of fact." (*Ibid.*) In general, substantial evidence is evidence of ponderable legal significance that is reasonable in nature, credible, and of solid value. (*Ibid.*)

To the extent the hearing officer rested his or her administrative decision on an interpretation or application of a statute or regulation, the matter presents a question of law for our independent review, requiring us to give considerable deference to the hearing officer's interpretation. (See *TG Oceanside L.P.*, *supra*, 156 Cal.App.4th at p. 1371 [hearing officer's interpretation of rent control ordinance subject to independent appellate review].)

Here, we are asked to review the Appeals Board's final administrative decision affirming the EDD's and ALJ's determinations that plaintiffs were (1) not eligible to receive work sharing benefits, and (2) liable for repayment of the amount of work sharing benefits they received. Accordingly, we review the administrative record to determine whether substantial evidence supports the factual findings on which the Appeals Board's decision rests. (*TG Oceanside L.P.*, *supra*, 156 Cal.App.4th at p. 1370.) However, we independently review the Appeals Board's interpretation and application of section 1279.5 and the regulations that implement the work sharing program, including California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3), which (as noted) provides that the calculation of hours worked during a work sharing week must include "[v]olunteer (unpaid) hours worked performing services during the week to which the certifications applies for the work sharing employer"<sup>22</sup> (italics added). (See

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<sup>22</sup> See footnote 19, *ante*.

*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840 ["We independently review the construction of statutes."].)

i. *Liberal construction of California's Unemployment Insurance Code*

"[O]n appeal, we liberally construe the Unemployment Insurance Code to advance the legislative objective of reducing the hardship of unemployment." (*Robles v. Employment Development Dept.* (2015) 236 Cal.App.4th 530, 546, citing *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584 ["The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment."].) Because the Unemployment Insurance Code is "a remedial statute[,] the provisions as to benefits must be liberally construed for the purpose of accomplishing its objects." (*Carlsen v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 577, 584 (*Carlsen*).)

B. *Analysis*

In support of their argument that they were entitled to the work sharing benefits they received from EDD, plaintiffs assert the judgment "is not supported by the evidence or the law." Specifically, relying on *Carlsen, supra*, 64 Cal.App.3d 577, plaintiffs argue the evidence does not demonstrate that the unpaid hours they spent in the office were reportable "[v]olunteer (unpaid) hours worked performing services" within the meaning of California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3).

Plaintiffs also rely on *Carlsen* for the proposition that the provisions of the Unemployment Insurance Code pertaining to work sharing benefits must be liberally construed to accomplish the purpose of the work sharing program which, they assert, is

"to allow a business to stay open and keep people employed." Plaintiffs further assert they "are not required to repay [work sharing] benefits because they were not at fault in making any erroneous claim for [those] benefits."

The Appeals Board counters these arguments by asserting that plaintiffs "were required to identify and certify *all* hours worked during the work sharing week, paid or unpaid," and that the court, in denying plaintiffs' petition for a writ of mandate, "correctly determined that the law requires [plaintiffs] to report their volunteer [or unpaid] hours." Specifically, the Appeals Board asserts "[t]he unpaid time [plaintiffs] spent trying to increase Southland's business was time spent, and *service provided*, for the benefit of their employer [(Southland)]" (*italics added*), and therefore "[plaintiffs'] unpaid work hours constitute volunteer work under California Code of Regulations, title 22, section 1279.5-8(b) and must be included when calculating the number of hours [plaintiffs] each worked during a given week." The Appeals Board maintains that *Carlsen, supra*, 64 Cal.App.3d 577, does not apply to this case because it involved unemployment benefits under section 1252, not work sharing benefits under section 1279.5. The Appeals Board also asserts the court properly determined that plaintiffs are liable under section 1375(a) for repayment of the work sharing unemployment benefits they received because they "failed to properly report their work hours" and, thus, "[they] were at fault for the overpayment of work share benefits."

1. *The Appeals Board's complete-ineligibility determination is not supported by substantial evidence*

California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3), provides in pertinent part:

"(b) Hours worked during the work sharing week shall include:  
[¶] . . . [¶] (3) *Volunteer (unpaid) hours worked performing services* during the week to which the certification applies [*sic*] for the work sharing employer." (Italics added.)

Here, in determining that plaintiffs were fully employed during the work sharing weeks in question, and therefore ineligible to receive *any* of the work sharing benefits they received, the Appeals Board treated all of the unpaid and unreported hours plaintiffs spent in the office, including the idle time they spent waiting for potential clients to call in, as reportable "[v]olunteer (unpaid) hours worked performing *services*" (italics added) within the meaning of the foregoing regulation.

However, the term "services" is not defined in section 1279.5, in the implementing regulations, or anywhere else in the Unemployment Insurance Code. (See § 1279.5; Cal. Code Regs., tit. 22, §§ 1279.5-1 ["Definitions"], 1279.5-8 [Calculation of Hour Reduction]; *Carlsen, supra*, 64 Cal.App.3d at p. 584 ["[t]he word 'service' [is not] defined in the [Unemployment Insurance Code]"].) The term "services" is also not defined at page 32 of EDD's Guide for Work Sharing Employers, which its representative, Von Werlhof, instructed Fitch to consult when Fitch asked for the

definition of the term "volunteer hours."<sup>23</sup> Although Von Werlhof testified that "any services being performed with the intent of acting on the company's behalf are considered as volunteer hours," his definition of "volunteer hours" is not included in the explanation of that term. As noted, plaintiffs cite *Carlsen, supra*, 64 Cal.App.3d 577 in support of their argument that the evidence does not demonstrate the unpaid hours they spent in the office were reportable "[v]olunteer (unpaid) hours worked performing services" within the meaning of California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3).

In *Carlsen*, the trial court denied a carpenter's petition for a writ of mandate to direct the Appeals Board to set aside administrative decisions denying his claim for unemployment insurance benefits under former section 1252. (*Carlsen, supra*, 64 Cal.App.3d at pp. 580-581, 582.) The evidence showed that the carpenter had formed his own corporation, that he was the president of the corporation, and that he and his wife were its owners. (*Id.* at p. 580.) The carpenter received no compensation for his services as president of the corporation; and, when he obtained employment through the corporation and worked as a carpenter, the corporation paid him union-scale carpenter's wages on which the corporation paid all the required taxes, including unemployment insurance. (*Id.* at p. 581.) When the corporation was unable to obtain any construction

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<sup>23</sup> Page 32 of EDD's Guide for Work Sharing Employers states in pertinent part: "Volunteer hours worked, *without pay*, by a participating employee must be included as part of the total hours worked during the week. Like overtime, there still must be a reduction in the total hours worked, including volunteer hours of at least 10 percent. [¶] All hours worked (paid or unpaid) during the Work Sharing week are calculated to determine the Work Sharing reduction."

contracts, the carpenter, in his capacity as the corporate president, continued to seek jobs for the corporation. (*Ibid.*) However, all sources of construction work had "dried up" and he devoted two hours a week to his efforts to obtain work for the corporation. (*Ibid.*) When he was unable to obtain work through the union hall, the carpenter filed a claim for unemployment insurance benefits under former section 1252. (*Carlsen*, at p. 581.) The EDD denied the carpenter's claim on the ground that, since he was still serving as president of the corporation, he was not "unemployed" within the meaning of former section 1252 (*Carlsen*, at p. 581), which provided in part that "[a]n individual is '*unemployed*' in any week . . . during which he *performs no services* and with respect to which no wages are payable to him" (*id.* at p. 483, italics added). A referee for the Appeals Board, concluding that the carpenter was not "unemployed" within the meaning of that section, affirmed the EDD's determination to deny him benefits, and on administrative appeal the Appeals Board adopted the referee's decision as its own. (*Id.* at pp. 582-583.)

The question before the *Carlsen* court was whether the carpenter "perform[ed] no *services*" (italics added) and thus was "unemployed," within the meaning of former section 1252 such that he was entitled to unemployment compensation benefits. (*Carlsen*, *supra*, 64 Cal.App.3d at p. 584.)

Noting that "the Unemployment Insurance Code is a remedial statute and the provisions as to benefits must be liberally construed for the purpose of accomplishing its objects" (*Carlsen*, *supra*, 64 Cal.App.3d at p. 584), the *Carlsen* court concluded that the carpenter was entitled to unemployment compensation benefits because he was

"unemployed" within the meaning of former section 1252. (*Carlsen*, at p. 584.) The court stated, "We are not persuaded by [the] contention that [the carpenter] continued to 'perform services' after he was laid off as a carpenter because he spent two hours a week attempting to find business for [the corporation]." (*Ibid.*, italics added.) Noting that the carpenter "received no wages of any kind" for the time he spent attempting to find business for the corporation and that he had never ceased looking for other employment through the union, the *Carlsen* court concluded that the carpenter's "activities on behalf of [the corporation] *did not constitute the performing of services* within the meaning of former section 1252." (*Id.* at p. 585, italics added.)

Here, *Carlsen* does not answer the question of whether the Appeals Board properly treated the unpaid and unreported time plaintiffs spent in the office as reportable "[v]olunteer (unpaid) hours worked performing services" within the meaning of California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3) and the work sharing program, because that case involved unemployment benefits under former section 1252, not work sharing benefits under section 1279.5.

However, we need not answer that question or construe the term "services" used in California Code of Regulations, title 22, section 1279.5-8, subdivision (b)(3), because the Appeals Board's determination that plaintiffs were not entitled to *any* of the work sharing benefits they received is not supported by substantial evidence. To prevail on its claim that plaintiffs were "fully employed" during the work sharing weeks in question and therefore liable under section 1375(a) for the repayment of *all* of the work sharing benefits they had received, EDD had the burden of proving that when plaintiffs were not

working the paid billable hours (on survey projects) and paid nonbillable hours (on overhead tasks) that they reported to EDD, they spent the remaining hours of their usual 40-hour week in the office. The record shows that EDD failed to meet its burden and that the Appeals Board acknowledged the evidence was insufficient to enable it to quantify the hours plaintiffs spent in the office.

Specifically, the record shows that, based on the testimony of Southland's part-time office manager, Sally Fitch, and other evidence presented at the evidentiary hearing in this matter, the ALJ found there was no documentation of the "actual hours [plaintiffs] were in the office." The ALJ similarly found there was an "absence of any evidence of the actual hours they spent on the job." Indeed, Sally Fitch testified she was in the office only 20 hours or less each week. Thus, she could not, and did not, testify about where plaintiffs were or what they were doing when she was not in the office. Based on the foregoing findings, the ALJ concluded EDD "properly denied" all of plaintiffs' claims for work sharing benefits, and the Appeals Board adopted those findings. The Appeals Board separately found that "the hours [plaintiffs] spent in the office during specified time periods" were not "quanti[fied]."

For the foregoing reasons, we conclude the Appeals Board's determination that plaintiffs were ineligible to receive *any* of the work sharing benefits is not supported by substantial evidence.

2. *The Appeals Board's determination that plaintiffs are liable for repayment of all of the work sharing benefits they received is not supported by substantial evidence*

We further conclude the Appeals Board's determination that plaintiffs are liable for repayment of all of the work sharing benefits they received was erroneous because its implied finding that they were at fault within the meaning of section 1375(a) is also not supported by substantial evidence.

Section 1375(a) provides in part: "Any person who is overpaid any amount of benefits under this part is liable for the amount overpaid unless any of the following is applicable: [¶] (a) [¶] (1) The overpayment was not due to fraud, misrepresentation or willful nondisclosure on the part of the recipient, and (2) *the overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience.*" (§ 1375(a)(1)-(2), italics added.)

Thus, plaintiffs cannot be held liable for any overpayment of work sharing benefits they received if (1) they received the overpayment "without fault" on their part, and (2) EDD's recovery of the overpayment "would be against equity and good conscience." (§ 1375(a).)

Here, the Board's implied finding that plaintiffs were at fault within the meaning of section 1375(a) is not supported by substantial evidence. As already noted, the Appeals Board treated all of the unpaid and unreported hours plaintiffs spent in the office, including the idle time they spent waiting for potential clients to call in, as reportable "[v]olunteer (unpaid) hours worked performing *services*" (italics added) within the meaning of California Code of Regulations, title 22, section 1279.5-8, subdivision

(b)(3). However, the term "services" as used in that regulation for purposes of the work sharing program was, and is, ambiguous. As we have already explained, the term "services" is not defined in section 1279.5, in the implementing regulations, or anywhere else in the Unemployment Insurance Code. (See § 1279.5; Cal. Code Regs., tit. 22, §§ 1279.5-1 [Definitions], 1279.5-8 [Calculation of Hour Reduction]; *Carlsen, supra*, 64 Cal.App.3d at p. 584.) The term "services" is also not defined at page 32 of the EDD's Guide for Work Sharing Employers, which EDD's representative, Von Werlhof, instructed Fitch to consult when Fitch asked for the definition of "volunteer hours." Although Von Werlhof testified that "any services being performed with the intent of acting on the company's behalf are considered as volunteer hours," his definition of "volunteer hours" is not included in the explanation of that term in the Guide for Work Share Employers.

Because the meaning of "services," and therefore the meaning of "[v]olunteer (unpaid) hours worked performing services," for purposes of the work sharing program was, and is, ambiguous, we conclude there is no substantial evidence to show plaintiffs were at fault for receiving any overpayment of work sharing benefits they received. Furthermore, we conclude that requiring them to repay all of the benefits they received "would be against equity and good conscience" (§ 1375(a)(2).)

For all of the foregoing reasons, the judgment is reversed.

## DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to grant the petition for writ of mandate.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.